STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2006
v	No. 259833 Missaukee Circuit Court
ROBERT EUGENE KREGEAR, Defendant-Appellant.	LC No. 04-101905-FH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating/maintaining a laboratory involving hazardous waste, MCL 333.7401c(2)(c), operating/maintaining a laboratory used to manufacture a controlled substance, MCL 333.7401c(2)(a), maintaining a drug house, MCL 333.7405(1)(d), and possession of methamphetamine, MCL 333.7403(2)(b)(i). The trial court sentenced him, as a fourth-offense habitual offender, MCL 769.12, to concurrent sentences of 13 to 22 years in prison for operating/maintaining a laboratory involving hazardous waste, 13 to 22 years in prison for operating/maintaining a laboratory used to manufacture a controlled substance, 10 to 15 years in prison for maintaining a drug house, and 10 to 20 years in prison for possession of methamphetamine. We affirm.

I. Facts

On February 17, 2004, law enforcement officers were dispatched to defendant's residence based on a report that a methamphetamine lab was being dismantled there. When the officers arrived, there was an overwhelming odor typically associated with methamphetamine production. The police also found, in defendant's apartment, numerous items commonly used in the production of methamphetamine, including a tank containing anhydrous ammonia, microwaves, a large air compressor, a blender, solvents, and surgical plastic tubing. Forensic testing revealed that methamphetamine was present on several of these items.

A witness testified that she saw defendant, who lived alone, making methamphetamine in his apartment the night before police discovered the operation. That witness had recently entered a guilty plea and was awaiting sentencing on methamphetamine-related charges; she hoped to receive a more favorable sentencing recommendation from the prosecutor in exchange for her testimony. She testified that defendant previously made methamphetamine at another location. But after he accidentally set fire to that location, he began manufacturing methamphetamine in

his apartment. Another witness, who lived on the same property as defendant, testified that he believed defendant was making methamphetamine in his apartment because of the strong odor and the heavy traffic to and from the apartment at night.

II. Analysis

A. Prosecutorial Misconduct

Defendant first argues that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

"Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, defendant's unpreserved claims of error may only be reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Reversal is not warranted "where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

To determine whether a defendant was denied a fair trial by a prosecutor's remarks, this Court examines the pertinent portion of the record and considers the remarks in context. *Callon, supra* at 330. The prosecutor's remarks must be read as a whole and evaluated in light of defense arguments and their relationship to the evidence presented at trial. *Id.* Remarks that might otherwise be improper may not require reversal if they respond to issues raised by the defense. *Id.*

Defendant argues that the prosecutor shifted the burden of proof to defendant during his rebuttal argument by stating that defendant could have conducted his own fingerprint testing to show that defendant's fingerprints were not on the physical evidence. A comment on a defendant's failure to testify or present evidence is improper if it attempts to shift the burden of proof. *Abraham, supra* at 273. The prosecutor does not shift the burden of proof, however, if the remarks, taken in context, merely challenge the credibility of a theory advanced by the defendant. *Callon, supra* at 331.

Throughout trial, defendant emphasized that the police did not conduct any fingerprint testing and therefore argued that there was no direct evidence linking him to the crimes. Defense counsel argued in closing that the absence of any fingerprint evidence pointed to defendant's innocence, and theorized that the police did not take fingerprints because doing so would have revealed an absence of defendant's fingerprints. Defense counsel suggested that defendant's fingerprints must not have been on the seized items, and he cross-examined several police witnesses regarding their failure to test the evidence for fingerprints. In light of this defense strategy, the prosecutor's argument that defendant could have performed his own fingerprint testing did not improperly shift the burden of proof.

Defendant further argues that the prosecutor denigrated defense counsel by accusing him of throwing out 43 "red herrings," an apparent reference to the number of times that defense counsel raised the issue of fingerprints in his closing argument. A prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury. *People v Watson,* 245 Mich App 572, 592; 629 NW2d 411 (2001). If a comment is directly responsive to a particular defense

argument, however, it is not improper. *Id.* at 593. In *Watson*, this Court concluded that a prosecutor's reference to "red herrings" was not improper because it was made in response to defense counsel's closing argument, emphasizing alleged discrepancies between various witness accounts. *Id.* at 592-593. Therefore, it was not improper for the prosecutor to respond "by emphasizing the truth of the big picture." *Id*. at 593.

The prosecutor's remarks in this case were similarly responsive to defense counsel's closing argument. The "red herring" reference was directed to defense counsel's argument regarding fingerprints. The prosecutor was attempting to dissuade the jury from focusing on a single issue, not launching a personal attack on defense counsel. We discern nothing improper in these remarks.

Defendant also argues that the prosecutor improperly vouched for a key witness, who was testifying with the understanding that if she testified truthfully, the prosecutor would give her a more favorable recommendation at her upcoming sentencing. The prosecutor stated,

> That's all she's getting out of this; a hope that the state through me based on her telling the truth as you've heard it, will get a positive recommendation about her minimum sentence. Doesn't affect the maximum sentence which is set by law, but only about her minimum sentence. And I think it's very important that you think about that and not just, oh, she made a deal with the state and she's here lying; that's not the case. That's not the case, and you'll get an instruction on exactly what is happening.

A prosecutor may not vouch for the credibility of a witness on the basis of special knowledge, otherwise unavailable to the jury, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), but may argue that, on the basis of the evidence, a witness is worthy or unworthy of belief, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Reference to a plea agreement warrants reversal only if it is used to suggest that the prosecutor has some special knowledge not known to the jury concerning the witness's truthfulness. *Bahoda, supra* at 276.

The challenged remarks by the prosecutor did not convey any special knowledge regarding her truthfulness. The prosecutor explained that the witness had already been convicted, and the only benefit she could receive was a more favorable sentencing recommendation from the prosecutor. The prosecutor was apparently trying to distinguish the arrangement from a plea agreement and point out that she had less to gain, and therefore was less likely to lie. A prosecutor may comment on the credibility of his own witness during closing argument and argue from the facts that the witness has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Furthermore, the prosecutor's agreement with the witness was first revealed to the jury by defense counsel during cross-examination. The prosecutor's remarks were, therefore, responsive to defense counsel's suggestion that the witness's testimony lacked credibility because of the agreement. There was nothing improper about these remarks.

B. Jury Instructions

Defendant next argues that the trial court erred in denying his request for an instruction on mere presence. CJI2d 8.5. We disagree.

Issues of law arising from jury instructions are reviewed de novo on appeal, but a trial court's determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; ___ NW2d ___ (2006). Jury instructions are read as a whole to determine whether there was an error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The trial court must instruct the jury on all elements of the charged offense and all theories and defenses supported by the evidence. *People v McKinney*, 258 Mich App 157, 162-163; 670 NW2d 254 (2003). If an applicable instruction was not given, the defendant must show that the failure to give the requested instruction resulted in a miscarriage of justice, i.e., that it appears more likely than not that the error was outcome determinative. *People v Riddle*, 467 Mich 116, 124-125; 649 NW2d 30 (2002).

The standard jury instruction for mere presence, CJI2d 8.5, states:

> Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he/she] was present when it was committed is not enough to prove that [he/she] assisted in committing it.

The trial court denied defendant's request to give this instruction, reasoning that defendant was not charged with aiding and abetting, it was not a theory of the case that he was an aider and abettor, and there was no evidence presented that he was an aider or abettor.

There was no evidence at trial that defendant was merely present while the methamphetamine was being manufactured. It was uncontested that it was his apartment, and it appears from the record that he lived alone. There was no evidence that the homeowner or another tenant was responsible for the production of the methamphetamine while defendant was merely a bystander. The trial court is not required to give a requested instruction if it is unsupported by the evidence. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Further, the instruction applies to a person charged with assisting in the commission a crime, and defendant was charged as a principal. Defendant did not argue that he was present as a bystander, but rather that he was gone when the crimes were committed. Therefore, the trial court correctly denied defendant's request to give the mere presence instruction. See *People v Moldenhauer*, 210 Mich App 158, 160-161; 533 NW2d 9 (1995).

Read as a whole, the instructions did not impair the defendant's ability to present the defense offered, i.e., that defendant had no connection to the alleged crimes. The jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis